

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:05-cv-00329-GKF-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE’S MOTION FOR STAY OF APPLICABILITY OF ORDER PENDING
RESOLUTION OF MOTION FOR RECONSIDERATION OF
COURT’S OPINION AND ORDER (DKT No. 1463)
*WITH REQUEST FOR EXPEDITED HEARING ON JANUARY 30, 2008***

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (“the State”), and respectfully moves for stay of the applicability of the Court’s Order (Dkt # 1463) pending resolution of the State’s accompanying Motion for Reconsideration (Dkt # 1486) for reasons set forth below and for expedited hearing of this motion.

I. Introduction

In its order of January 16, 2008 (Dkt. # 1463) (“the Order”) the Court (1) held that the state law of attorney client privilege applies to this federal question case, (2) required the State to revise its privilege logs in such a fashion that they would disclose to Defendants “how disclosure [of documents for which attorney client privilege is claimed] will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest,” and (3) held that Peterson Farms has established a “special

need” for documents for which the State has claimed work product protection, without making provision to protect against disclosure the mental impressions, conclusions, opinions, or legal theories of attorneys or other representatives of the State. The Court ordered disclosure of documents and revision of privilege logs within 30 days. The State has moved for reconsideration of this Order. (Dkt # 1486). For the following reasons, the State respectfully asks the Court to stay applicability of the Order pending resolution of that reconsideration motion. (Dkt # 1486).

II. The Court should stay applicability of its Order pending resolution of issues presented in the State’s motion for reconsideration

The Court’s Order erroneously holds that state rather than federal privilege law applies in this federal question case and, in addition, requires that the State must produce a large number of documents for which it asserts claims of work product protection within 30 days of the date of the Order. As a result, a large number of documents for which the State claims attorney client privilege and work product protection must be released to Defendant Peterson Farms, and the State must undergo the burdensome task of rewriting its privilege logs to comply with the supposed requirements of state privilege law, which requirements do not exist under the federal common law of attorney client privilege.

As one court has stated with regard to a determination of the applicability of the attorney client privilege:

Because of the sensitivity surrounding the attorney-client privilege, care must be taken that, following any determination that an exception applies, the matters covered by the exception be kept under seal or appropriate court-imposed privacy procedures until all avenues of appeal are exhausted.

Haines v. Liggett Group, Inc., 975 F.2d 81, 97 (3d Cir. 1992) (granting writ of mandamus to reverse order that crime-fraud exception to the attorney-client, work product and joint defense

privileges applied to allegedly privileged documents). The Court does not have the privileged documents in its custody in the present case, but the reason for protecting the State's privileged documents in the instant case is no less important. Because of the importance of the State's claims of privilege and work product protection, the subject documents should not be released to Peterson Farms pending exhaustion of "all avenues of appeal." To do otherwise, is effectively to negate the right of the State to appeal the Order. The State should be permitted an orderly appeal of the Court's Order before compliance is required because the moment privileged information is divulged the point of having the privilege is lost. *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1368-69 (10th Cir. 1997).

Moreover, the State will have to devote considerable resources to complying with the Court's Order. Given the weighty reasons to believe that Order, upon reconsideration or appeal, will be reversed, the State should not have to begin the process of reviewing its privileged documents for production or placement on revised privilege logs until these issues are finally resolved.

Because of the 30 day production and privilege log revision requirements in the Order, the State submits that expedited consideration of this motion for stay is appropriate, and asks the Court to set this motion at its earliest convenience.

WHEREFORE, the State respectfully moves for a stay of the applicability of the Court's Order (Dkt # 1463) pending resolution of the State's accompanying Motion for Reconsideration (Dkt # 1486) and for expedited consideration of this motion.

Respectfully Submitted,

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